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2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF WASHINGTON  
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6 TRAVELERS CASUALTY AND  
7 SURETY COMPANY,

8 Plaintiff,

9 vs.

10 WASHINGTON TRUST BANK,

11 Defendant.

)  
) No. CV-13-0409-JLQ

) ORDER RE: MOTION  
) TO DISMISS  
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12 BEFORE THE COURT is the Motion to Dismiss (ECF No. 12) filed by Defendant  
13 Washington Trust Bank (the "Bank"). The Motion seeks to dismiss all claims asserted  
14 in the First Amended Complaint by Plaintiff Travelers Casualty and Surety Company as  
15 the assignee and subrogee of Skils'Kin (hereafter "Travelers"). The court heard  
16 telephonic oral argument on the Motion on March 12, 2014. Mark E. Wilson argued for  
17 Travelers. Leslie Weatherhead participated on behalf of the Bank. Prior to the hearing,  
18 the court allowed additional briefing concerning subject matter jurisdiction. The court  
19 has reviewed those briefs.

20 **I. Standard for Motion to Dismiss**

21 A motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6)  
22 tests the sufficiency of the pleading. Under Fed.R.Civ.P. 8, a pleading must contain a  
23 short and plain statement of the claim showing that the pleader is entitled to relief. This  
24 standard "does not require detailed factual allegations, but it demands more than an  
25 unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556  
26 U.S. 662, 678 (2009). In order to survive a motion to dismiss, a pleading must contain  
27

1 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its  
2 face. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere  
3 conclusory statements, do not suffice." *Id.* "When there are well-pleaded factual  
4 allegations, a court should assume their veracity and then determine whether they  
5 plausibly give rise to an entitlement to relief." *Id.* at 679.

## 6 **II. Factual Allegations - First Amended Complaint**

7 On a motion to dismiss, the court accepts as true well-pleaded factual allegations.  
8 Therefore, for the purposes of this Motion, the facts are as pled in the First Amended  
9 Complaint ("FAC" at ECF No. 5). Plaintiff Travelers, as the assignee and subrogee of  
10 Skils'Kin, alleges that Skils'Kin is a community-based non-profit agency which provides  
11 services to developmentally disabled adults. Travelers alleges that Skils'Kin had an  
12 account at the Bank where it transacted checks for its disabled clients, and that the Bank,  
13 in violation of reasonable commercial standards and without exercising ordinary care,  
14 cashed checks for Shannon Patterson even though she was not a named payee, when  
15 those checks were payable to various third-party payees, including Skils'Kin disabled  
16 clients. (FAC ¶¶ 5-7). Travelers claims the checks were not "properly payable" under  
17 RCW 62A.4-401(a). Travelers further alleges that the checks which were improperly  
18 cashed bore no unauthorized signatures, alterations, or indorsements. (FAC ¶ 11).  
19 Travelers admits that Patterson signed the back of the checks, but alleges this was not  
20 an indorsement, but rather was to acknowledge receipt of cash. (*Id.*). Skils'Kin allegedly  
21 had no way of discovering the improper payments because the monthly statements  
22 generated by the Bank did not contain copies of the backs of the checks. (FAC ¶ 12).

23 Travelers alleges that it issued an insurance policy to Skils'Kin, that Skils'Kin  
24 made a claim, and that Travelers paid the claim. (FAC ¶¶ 15-17). The FAC specifically  
25 describes only one check that was improperly payable in the amount of \$5,500.  
26 However, Travelers alleges there were "many" checks at issue and that the \$5,500 check  
27 is just an "example", and further pleads that the total loss was \$577,919.74.

### III. Discussion

**A. Jurisdiction** - The central focus of Bank's Motion to Dismiss (ECF No. 12) is that Travelers has failed to plead facts sufficient to state a claim. The Bank also briefly argues that Travelers has not pled facts necessary to establish the \$75,000 amount in controversy requirement for diversity of citizenship jurisdiction under 28 U.S.C. § 1332 (ECF No. 12, p. 3-4). At the Scheduling Conference in this matter on February 27, 2014, the court raised the issue of whether there was complete diversity of citizenship because Skils'Kin appeared to be a citizen of Washington. The court directed the parties to *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089 (9<sup>th</sup> Cir. 2004) in which the Ninth Circuit held that under Washington law, in a subrogation action, the insured remains the real party in interest and must be named. The result in *Hughes*, was that inclusion of the insured in the action as a named party destroyed diversity of citizenship jurisdiction and required dismissal for lack of jurisdiction.

Subsequent to *Hughes*, in *Absher Const. Co. v. North Pacific Ins. Co.*, 2012 WL 13707 (W.D. Wash. 2012), the court distinguished between assignment and subrogation. The court stated that under Washington law, "an assignee prosecutes an assigned cause of action under its own name as the real party in interest." *Id.* at 4 citing RCW 4.08.080. The District Court in *Absher Const. Co.* additionally cited favorably to Couch on Insurance for the proposition that "while subrogation is a designation of proceeds recovered from a wrongdoer, an assignment transfers the entire cause of action to the insurer." *Id.* at 5 citing 16 Couch on Insurance § 222:53 (3<sup>rd</sup> ed. Nov. 2011). Travelers has pled that Skils'Kin assigned claims to it, and also that Travelers is the assignee and subrogee. (FAC ¶¶ 16-17). Further, as an exhibit to its supplemental brief (ECF No. 24-1), Travelers has filed the assignment document. The assignment document further states that is in consideration of \$696,208.00 paid to Skils'Kin by Travelers under the insurance policy.

1 The court is satisfied both as to diversity of citizenship and the amount in  
2 controversy and finds that it has jurisdiction.

3 **B. Failure to State a Claim**

4 The Bank complains generally that the allegations in the FAC are not detailed  
5 enough. See for example (ECF No. 12, p. 2)(“...Travelers does not provide specifics as  
6 to the dates, amounts, or payees of the items...”). The Bank acknowledges that this sort  
7 of deficiency would not merit dismissal of the action. See Bank’s Reply at ECF No. 17,  
8 p. 2, stating, “the Bank agrees that if Travelers *does* have a claim...it is entitled to try to  
9 re-plead it”. The concluding paragraph of the Bank’s Reply Brief calls Travelers claims  
10 “vague and indefinite” and argues that Travelers should be required to plead more facts.  
11 (ECF No. 17, p. 14). Federal Rule of Civil Procedure 8(a)(2), of course, requires only  
12 a “short and plain statement of the claim showing that the pleader is entitled to relief”.  
13 The Bank’s concerns regarding the amount in controversy, the dates the checks were  
14 cashed, etc., could have been appropriately addressed with a Motion for More Definite  
15 Statement under Fed.R.Civ.P. 12(e).

16 Similarly, the Bank argues with some of Travelers’ allegations, and effectively  
17 asks the court to view the factual allegations as untrue. For example, Travelers alleges  
18 that the bank account statements did not return canceled checks to Skils’Kin, only  
19 included copies of the front of the check, and “contained no telephone number identified  
20 as one that Skils’Kin could call to request the canceled checks”. (FAC, ¶ 12). Travelers  
21 alleges that without a copy of the back of the check, which could have contained a  
22 signature or indorsement, Skils’Kin could not discover that the check was improperly  
23 paid. The Bank argues that this is an insufficient allegation that the bank statements  
24 provided to Skils’Kin failed to provide required information. The Bank claims that it is  
25 “artful” pleading by Travelers that the phone number was not “identified as one that  
26 Skils’Kin could call” and that this is different from an allegation that there was no phone  
27 number. The court disagrees that the allegation is insufficient. Although the court finds

1 it doubtful that a bank statement did not contain a phone number, in today's electronic  
2 age it is not implausible that perhaps instead of a phone number that statement contained  
3 only a customer service e-mail or a website address. The disputed factual content of the  
4 bank statements is not an issue to be determined via a motion to dismiss. The court does  
5 note that the Bank has provided a copy of one monthly statement, from August 2012.  
6 That statement provides at the top of page 1: "For assistance, call: PRIORITY SERVICE  
7 1-800 788-4578". (ECF No. 23). However, the court cannot make a factual finding  
8 adverse to Travelers based on one bank statement that was filed by the Bank with its  
9 Reply Brief. Travelers has an obligation to only advance factual contentions that have  
10 evidentiary support. Fed.R.Civ.P. 11(b)(3).

### 11 **C. Statute of Limitations**

12 The Bank's most probative argument concerns the statute of limitations. The  
13 Bank states that there are "two relevant statutes of limitation." (ECF No. 12, p. 4). The  
14 three year statute of limitation under RCW 62A.4-111, and what the Bank calls the  
15 "narrower" provision of RCW 62A.4-406, which is one year. (ECF No. 12, p. 4-5). The  
16 Bank argues that the one year period applies, and that the one check specifically alleged  
17 in the FAC was cashed in August 2012, approximately 16 months prior to suit being  
18 filed.

19 Both parties agree that a case can only be dismissed on statute of limitations  
20 grounds when it is apparent from the face of the complaint that the claims are time-  
21 barred. Travelers contends that the one-year statute of limitations does not apply  
22 because it is only triggered when a bank makes a bank statement and canceled checks  
23 available to the customer. Travelers has pled that the monthly statements did not return  
24 the canceled checks. (FAC ¶ 12). Travelers also argues that its lack of specificity in  
25 pleading precludes the defense. Travelers states it did not plead the dates on which  
26 canceled checks were made available, and did not plead the dates on which it reported  
27 to the Bank that the checks had been improperly paid. (ECF No. 15, p. 8). Travelers

1 argues the statute of limitations in RCW 62A.4-406 defense is not established based on  
2 the face of the FAC and is an affirmative defense that the Bank will have the burden to  
3 plead and prove.

4 It is not apparent from the face of the FAC that Travelers claims are time-barred.  
5 Bank's request to dismiss the claims on statute of limitations grounds is denied.

#### 6 **IV. Conclusion**

7 The Bank has filed a Motion seeking to utilize the more rigorous pleading  
8 standards of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556  
9 U.S. 662 (2009) to argue that Travelers has failed to state a claim. The Bank's Motion  
10 is hyper-technical and requests too much. Travelers is not required to plead the check  
11 number, amount, and date for all of the dozens, or more, checks it claims were  
12 wrongfully paid by Bank. For the reasons stated herein, the Motion is denied. However,  
13 the court does observe that the facts pled were minimal. Travelers pled the details of  
14 only one check in the amount of \$5,500.00, while claiming over \$500,000.00 in losses.  
15 The Bank's contention that some of the allegations are "artful", may be accurate. It  
16 appears that the omission of certain facts may have been deliberate. For example,  
17 Traveler's Response Brief argues that the running of the statute of limitations is not  
18 apparent because Travelers did "not allege any dates whatsoever as to when any  
19 statement or item was made available" and did "not allege when Skils'Kin first reported  
20 to the Bank that it paid the checks at issue." (ECF No. 15 at p. 8). The court has  
21 determined that Travelers was not required to provide that level of detail in its FAC.  
22 However, like any litigant, Travelers has a duty to only advance legal contentions  
23 warranted by law and factual contentions that have evidentiary support.

#### 24 **IT IS HEREBY ORDERED:**

- 25 1. The Motion to Dismiss (ECF No. 12) is **DENIED**.
- 26 2. The Bank shall file an Answer within fourteen (14) days.

1       **IT IS SO ORDERED.** The Clerk shall enter this Order and furnish copies to  
2 counsel.

3       Dated this 13<sup>th</sup> day of March, 2014.

4                               s/ Justin L. Quackenbush  
5                               JUSTIN L. QUACKENBUSH  
6                               SENIOR UNITED STATES DISTRICT JUDGE  
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